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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MICHAEL A. HADDLE,
Petitioner,

v.

JEANETTE G. GARRISON, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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July 24, 1998

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MOTION OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law hereby requests, pursuant to Rule 37 of the Rules of this Court, leave to file the accompanying brief as *amicus curiae* in support of the Petitioner. The issues to be decided herein affect the interests of the Lawyers' Committee, as set forth in the accompanying brief.

The Lawyers' Committee obtained the consent of the Petitioner and of Respondents Jeanette G. Garrison, HLM, Inc.

(f/k/a "Healthmaster"), Christopher Garrison, and G. Peter Molloy. Letters of consent have been filed with the Clerk of the Court. It was unable to reach Respondent Dennis Kelly to obtain his consent because he is incarcerated.

For the foregoing reasons, the Lawyers' Committee's Motion for Leave to File a Brief as *Amicus Curiae* in support of the Petitioner should be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether an at-will employee is "injured in his person or property" when he is fired, in violation of the first clause of 42 U.S.C. § 1985(2), because he had cooperated in a federal criminal investigation of his employer, testified under subpoena before a federal grand jury, and was a potential witness in federal criminal proceedings against his employer?

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights organization founded in 1963 by leaders of the American bar at the request of President Kennedy, to provide legal representation to the victims of civil rights violations. Its Board of Trustees has included several past Presidents of the American Bar Association, past Attorneys General of the United States, past Solicitors General of the United States, past Assistant Attorneys General for the Civil Rights Division of the Justice Department, past Chairs of the Equal Employment Opportunity Commission, past Secretaries of Cabinet Departments, law school deans and professors, and many of the nation's leading lawyers. Over the last thirty-five years, the Lawyers' Committee and local Committees in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. have represented members of minority groups and women in hundreds of civil rights cases.

This case concerns the proper interpretation of 42 U.S.C. § 1985(2), an important civil rights statute enacted as part of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, also known as the Ku Klux Klan Act. In recognition of the fact that parties and witnesses might be intimidated or prevented by others from testifying or appearing in federal court, this statute seeks in part to preserve the integrity of federal judicial proceedings and to safeguard the right of access to the federal courts. The

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[1] The position that the Lawyers' Committee takes in the following brief has not been approved or financed by Petitioner or his counsel. No counsel for any party had any role in authoring this brief.

Lawyers' Committee, which was created in order to assist individuals in securing a judicial forum for the resolution of their civil rights claims, has a strong interest in the outcome of this case because it will affect the degree to which § 1985(2) safeguards access to the federal courts for civil rights plaintiffs and witnesses. If affirmed, the decision below would deny the protections afforded in § 1985(2) to individuals working under employment contracts of indefinite length -- "at-will employees" -- who constitute more than 88% of private, nonagricultural wage and salary employees in the United States, and many others, and would thereby substantially undermine the statute's fundamental purpose of protecting those who testify about, or cooperate in investigations into, violations of law.

STATEMENT

A. Statutory Background.

The statutory provision codified at 42 U.S.C. § 1985(2) was enacted during Reconstruction as part of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, also known as the Ku Klux Klan Act. See *Kush* v. *Rutledge*, 460 U.S. 719, 724 (1983).[2] The Act creates a private cause of action on behalf of any person injured by any act in furtherance of a conspiracy to interfere with federal judicial proceedings by using "force, intimidation, or threat[s]" "to deter . . . any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to

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[2] Section 2 of the Ku Klux Klan Act of 1871 includes language that is virtually identical to that in 42 U.S.C. § 1985(2). *See Kush*, 460 U.S. at 728 (Appendix).

injure such party or witness in his person or property on account of his having so attended or testified." 42 U.S.C. § 1985(2).[3] Congress concluded that "[p]rotection of the processes of the federal courts was an essential component of [the] solution to disorder and anarchy in the Southern States"

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[3] 42 U.S.C. § 1985(2) provides:

> Obstructing justice; intimidating party, witness, or juror
>
> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

during Reconstruction. *Kush*, 460 U.S. at 727. This Court has stated that Congress' power to enact 42 U.S.C. § 1985(2) derives from "the Federal Government's unquestioned constitutional authority to protect the processes of its own courts." *Kush*, 460 U.S. at 723.

Two aspects of the statutory structure should be noted. *First*, 42 U.S.C. § 1985(2) actually contains two clauses. The first clause addresses interference with *federal* judicial proceedings. The second clause addresses interference with *state* judicial proceedings. Only the first clause is at issue in this case. *Second*, the language creating the cause of action for violation of § 1985(2) actually is in the last clause of § 1985(3), which provides that a party who is "injured in his person or property" or denied any "right or privilege of a citizen of the United States" by "any act in furtherance of the object of [a] conspiracy" defined in § 1985 may recover damages.[4]

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[4] The relevant portion of 42 U.S.C. § 1985(3) provides:

> . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

B. Factual Background

Petitioner's Amended Complaint provides the facts upon which this case must be decided because the court of appeals affirmed the district court's decision dismissing the Complaint as a matter of law.

Petitioner Michael A. Haddle was employed from September 1986 until June 1995 by Respondent Healthmaster, Inc. ("Healthmaster") or one of it subsidiaries. Complaint ¶¶ 7, 8, 16. According to the district court, Petitioner "concedes that he was an at-will employee" at all relevant times. Pet. App. 4a. On March 8, 1995, a grand jury in the Southern District of Georgia filed an indictment against Healthmaster and other Respondents, charging 133 counts of health care fraud. Complaint ¶ 12. Petitioner had "cooperated with the investigation by federal agents which preceded this indictment and testified pursuant to subpoena before said grand jury and appeared pursuant to subpoena to testify before said grand jury, although his testimony was not actually taken due to the press of time." Complaint ¶ 14.[5] In April or May of 1995, a trustee

[5] This statement, which is quoted verbatim from the Complaint, suggests that Petitioner was called to appear before the grand jury on more than one occasion, but did not testify on every occasion. In their oppositions to the petition for certiorari, some of the Respondents claim that the Complaint suggests that Petitioner, although subpoenaed, did not actually testify due to the press of time. Brief in Opposition of Respondents Jeanette G. Garrison, HLM, Inc. (f/k/a Healthmaster, Inc.) and Christopher Garrison 3; Brief in Opposition of G. Peter Molloy (continued...)

in bankruptcy was appointed for Healthmaster under chapter 11 of the federal Bankruptcy Code. Complaint ¶ 9. After their indictment, Respondents Garrison and Kelly were banned from participation in the affairs of Healthmaster Home Health Care, Inc., by order of the bankruptcy court. Complaint ¶ 15.

"[P]ursuant to a prior understanding and agreement between" Respondents Garrison, Molloy, and Kelly, Petitioner was terminated from his employment on June 21, 1995, after Respondents "had become aware that [Petitioner] would appear as a witness at the criminal trial" on the indictment. Complaint ¶ 16. The termination was "for the purpose of retaliating against [Petitioner] for his cooperation with federal agents and his testimony under subpoena to the federal grand jury, and in order to intimidate [Petitioner] and others from cooperating with federal agents or testifying in any criminal matters against [the Respondents] including [the] indictment." Complaint ¶ 18. In short, the termination was not for any legitimate business purpose, "but rather to protect [Respondents] as criminal defendants or potential criminal defendants" and to deter others from coming forward. Complaint ¶ 19.

Petitioner filed suit against Healthmaster and the other Respondents in the United States District Court for the

[5] (...continued)
2. This ambiguity is immaterial, however, because the statute prohibits not only retaliation against individuals who have provided testimony but also threats against, or intimidation of, individuals to deter testimony. In any event, this factual ambiguity could not be resolved against Petitioner on a motion to dismiss.

Southern District of Georgia. He brought claims under 42 U.S.C. § 1985(2) and Georgia state law. The claim under § 1985(2) alleged that Respondents "conspired within the State of Georgia to deter, by force, intimidation or threat, a party or witness in the United States District Court for the Southern District of Georgia, from attending such court, or from testifying in any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of the grand jurors of such court." Complaint ¶ 20. The claim further alleged that Petitioner was "injured in his person and property" by the acts of Respondents. Complaint ¶ 21.

C. Proceedings Below.

The district court granted the motions of four Respondents under Fed. R. Civ. P. 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted. The court held that under "binding precedent of the Eleventh Circuit," Petitioner could not maintain an action under section 1985(2) because he was an at-will employee. Pet. App. 5a. The court relied on and quoted the following passage from *Morast* v. *Lance*, 807 F.2d 926, 930 (11th Cir. 1987), which was the Eleventh Circuit's entire analysis of the issue:

> [T]o make out a cause of action under § 1985(2) the plaintiff must have suffered an actual injury. Because [Plaintiff] was an at-will employee . . . he had no constitutionally protected interest in continued employment. Therefore, [Plaintiff's] discharge did not constitute an actual injury under this statute.

Pet. App. 5a. The court declined to retain discretionary supplemental jurisdiction over the remaining state law claims. *Id.* at 6a.

The Eleventh Circuit affirmed the district court's decision in an unpublished, per curiam opinion. The court summarily held "that Haddle's arguments on appeal are foreclosed by this court's decision in *Morast* v. *Lance*, 807 F.2d 926 (11th Cir. 1987)." Pet. App. 2a.

SUMMARY OF ARGUMENT

The Eleventh Circuit's holding that 42 U.S.C. § 1985(2) does not protect at-will employees from intimidation and retaliation has no basis in the statutory text. The plain language of 42 U.S.C. § 1985(2) provides a cause of action for a person injured in any way by any act in furtherance of a conspiracy to interfere with federal judicial proceedings by threat, intimidation, or retaliation. The phrase "injured in his person or property" is broad and without qualification or limitation. Nor is there any textual support for the court of appeals' conclusion that Petitioner was required to demonstrate an injury that rises to the level of a separate and distinct constitutional violation. Indeed, this requirement of an independent constitutional violation is inconsistent with this Court's analysis and conclusion in *Kush* v. *Rutledge*, 460 U.S. 719 (1983). Nor can the Eleventh Circuit's ruling derive support from the procedural due process principles that this Court established in cases such as *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972). This Court explicitly has held that a plaintiff's at-will employment status does not defeat his claim that he was fired in retaliation for exercising rights protected under federal law. See, *e.g.*, *Mount Healthy City*

Board of Education v. *Doyle*, 429 U.S. 274, 283-84 (1977) (First Amendment rights); *Perry*, 408 U.S. at 596-98 (same).

The legislative history of the Ku Klux Klan Act of 1871, from which 42 U.S.C. § 1985(2) is derived, confirms that Congress intended to provide a broad remedy for any and all manner of obstruction of federal judicial proceedings. The legislative history reveals that a principal focus of the legislation was to empower the federal courts to protect civil rights because the state courts were unable or unwilling to do so. Given the grave concerns that motivated Congress to provide remedies in the federal courts, including the Klan tactic of corrupting the courts, it is hardly conceivable that Congress intended to limit the types of injuries that might be actionable as a result of intimidation and retaliation that the 1871 Act covered. In addition, the Enforcement Act of 1870, ch. 114, 16 Stat. 140, which proscribes voter intimidation in the form of retaliatory discharge, provides further evidence that Congress in the 1871 Act intended to proscribe employment retaliation as a means of subverting civil rights.

No purpose of the statute would be served by denying protection to at-will employees. To the contrary, the purposes of preserving the integrity of federal judicial proceedings and safeguarding the right of access to the federal courts would be undermined if at-will employees were denied protection. At-will employees represent a significant portion of the work force and are the class of employees that is most in need of protection against the types of improper retaliation and intimidation that 42 U.S.C. § 1985(2) proscribes. Accordingly, the Eleventh Circuit's interpretation of the statute cannot be consistent with Congress' intent because it creates a loophole for a significant

category of employer intimidation and retaliation that undermines the integrity of the federal courts.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTE PROVIDES A CAUSE OF ACTION FOR A PERSON INJURED IN ANY WAY BY ANY ACT IN FURTHERANCE OF A CONSPIRACY TO INTERFERE WITH FEDERAL JUDICIAL PROCEEDINGS BY THREAT, INTIMIDATION, OR RETALIATION.

A. The Language of the Statute is Broad and Unlimited.

42 U.S.C. § 1985(2) provides a damages remedy to any person injured as a result of an act in furtherance of certain unlawful conspiracies. More specifically, a plaintiff must demonstrate that he was "injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States" as a result of an act in furtherance of a prohibited conspiracy. 42 U.S.C. § 1985(3). The phrase "injured in his person or property" is broad and without qualification or limitation, consistent with the statute's purpose to discourage "all conspiracies, whatever their motivation or target, that use threats, force, or intimidation to deter free, full, and truthful testimony." *McCord* v. *Bailey*, 636 F.2d 606, 614 n.12 (D.C. Cir. 1980). The terms "injury to person" and "injury to property" are broadly inclusive terms of art that impose no limits on the *type* of injury that is compensable under the statute. Indeed, on their face, these general terms encompass all manner of physical, psychological, and economic injury. Thus,

the "injured in his person or property" language simply establishes that a plaintiff under 42 U.S.C. § 1985(2) must demonstrate that he suffered some injury that is compensable by monetary damages as a result of an act in furtherance of a conspiracy to intimidate a party, witness, or juror in a federal judicial proceeding.

The foregoing reading of the statutory text is consistent with this Court's approach to interpreting other Reconstruction-era civil rights laws, which has been to "accord [them] a sweep as broad as [their] language" in order to give them "the scope that [their] origins dictate." *United States* v. *Price*, 383 U.S. 787, 801 (1966); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968). In *Price*, for example, this Court held that 18 U.S.C. § 241,[6] a criminal conspiracy statute derived from the Enforcement Act of 1870, encompasses rights protected by the Fourteenth Amendment because "its language embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States." 383 U.S.

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[6] 18 U.S.C. § 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured --
>
> They shall be fined under this title or imprisoned not more than ten years, or both. . . .

at 800 (emphasis in original). Similarly, in *Alfred H. Mayer*, this Court held that 42 U.S.C. § 1982,[7] a federal housing anti-discrimination statute derived from the Civil Rights Act of 1866, prohibits "*all* discrimination against Negroes in the sale or rental of property -- discrimination by private owners as well as discrimination by public authorities" because the plain language of the statute is broad and unlimited. 392 U.S. at 421 (emphasis in original). Under the approach followed by this Court in *Price* and *Alfred H. Mayer*, the phrase "injured in his person or property" must be read to encompass *all* types of injuries to person or property that result from conspiracies to interfere with federal judicial proceedings because the statutory language is unlimited on its face.

The foregoing statutory construction also is consistent with the only decision of this Court construing the first clause of 42 U.S.C. § 1985(2), *Kush* v. *Rutledge*, 460 U.S. 719 (1983). The issue before the Court in *Kush* was whether a plaintiff asserting a claim under the first clause of 42 U.S.C. § 1985(2), which applies to federal proceedings, must allege racial or class-based animus in order to establish a cause of action. Consistent with the broad principles of construction that it applied in *Price* and *Alfred H. Mayer*, the Court held that no such allegation is required because the clause "contain[s] no language requiring

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[7] 42 U.S.C. § 1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

that the conspirators act with intent to deprive their victims of the equal protection of the laws." *Kush*, 460 U.S. at 725.

The Court contrasted the first clause of § 1985(2) with the second clause of § 1985(2), which applies to *state* proceedings and expressly requires a denial of equal protection. The Court concluded that this textual difference in the clauses of § 1985(2) reflects a deliberate choice by Congress. Specifically, Congress deliberately added the "equal protection" language to the second clause of § 1985(2) and to other portions of the statute that "encompass underlying activity that is not institutionally linked to federal interests and that is usually of primary state concern." *Id.* Congress, however, did not add the "equal protection" language to the first clause of § 1985(2) because "[n]either proponents nor opponents of the bill had any doubt that the Constitution gave Congress the power to prohibit intimidation of parties, witnesses, and jurors in federal courts." *Id.* at 727.

In sum, in *Kush* the Court concluded that an allegation that private defendants had conspired to intimidate and threaten various potential material witnesses in order to prevent them from testifying "freely, fully and truthfully" in plaintiff's federal lawsuit was sufficient to state a cause of action under the first clause of § 1985(2) because: (1) the first clause of § 1985(2) broadly -- and without qualification -- proscribes any act in furtherance of a conspiracy to interfere with the administration of justice in federal courts; (2) there is no basis in the text of § 1985(2) for requiring proof of any racial or class-based animus; and (3) there is no reason to think Congress intended any such requirement since its power to provide a substantive remedy for intimidation of parties, witnesses, and jurors in federal courts derives directly from its unquestioned power

under the Constitution to establish the federal courts and to ensure the integrity of their proceedings.

The Court's reasoning in *Kush* compels the same result here. As in *Kush*, there simply is no basis in the broad statutory text for the narrowing construction adopted by the Eleventh Circuit. Just as the statutory text contains no language to suggest an added requirement of class-based animus, the statutory text contains no language to suggest an added requirement that the injury be to a distinct constitutionally protected interest. To the contrary, the text of the statute categorically guarantees to all persons the substantive right to participate in federal judicial proceedings, free from threats, intimidation or reprisal. Denial of that right is an injury in fact sufficient to invoke the civil remedy provided by Congress in the last clause of § 1985(3). Of course every plaintiff under § 1985(2), including at-will employees, must prove damages in order to recover more than a nominal award. Like the plaintiff in *Kush*, however, Petitioner is entitled to invoke the express cause of action created by Congress and have his day in court to prove damages. See *Kush* v. *Rutledge*, 460 U.S. at 723-27 & n.5.

B. The Court of Appeals' Interpretation of the Statute Has No Basis in the Statutory Text and is Inconsistent with the Decisions of this Court.

1. The court of appeals' conclusion that the statute does not protect at-will employees from intimidation and retaliation has no basis in the statutory text. On its face, there is nothing in the general and unlimited language of the statute to suggest that at-will employees are beyond the reach of its protection. Thus, it is not surprising that the Eleventh Circuit, in the decision below

and in *Morast* v. *Lance*, 807 F.2d 926 (11th Cir. 1987), did not discuss the statutory language at all, much less identify any statutory language in support of its holding. There is none.[8]

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[8] The lower court is not unique in failing to recognize any meaningful interest in contracts of employment for an indefinite term. Its decision joins company with the disturbing rulings of a number of lower courts that have held or suggested that 42 U.S.C. § 1981 does not apply to such contracts. *Gonzalez* v. *Ingersoll Milling Machine Co.*, 133 F.3d 1025, 1034–35 (7th Cir. 1998) (*dictum*); *Hawkins* v. *Pepsico Inc.*, __ F. Supp. __, No. 6:96CV01013, 1998 WL 384733 (M.D.N.C. July 6, 1998); *Spriggs* v. *Diamond Auto Glass*, No. S97-1449, 1997 WL 880756 (D. Md. Oct. 15, 1997), *appeal pending*, No. 97–2575 (4th Cir.); *Moorer* v. *Grumman Aerospace Corp.*, 964 F. Supp. 665, 676 (E.D. N.Y. 1997), *aff'd*, No. 97–7790, 1998 U.S. App. LEXIS 3233 (2d Cir. Feb. 27, 1998); *Moscowitz* v. *Brown*, 850 F. Supp. 1185, 1192 (S.D.N.Y. 1994); *Simpson* v. *Vacco*, No. 96 CIV. 3916 (JFK), 1998 WL 118155 (S.D.N.Y., Mar. 17, 1998), *reconsidered on other grounds*, 1998 WL 264850 (May 26, 1998). *Contra McKnight* v. *General Motors Corp.*, 908 F.2d 104, 109 (7th Cir. 1990) (*dictum*); *Marquess* v. *City of Philadelphia*, No. 98-1117, 1998 WL 355519 (E.D. Pa. June 29, 1998); *Larmore* v. *RCP/JAS, Inc.*, No. 97-5330, 1998 WL 372647 (E.D. Pa. May 19, 1998); *Nguyen* v. *Benson Toyota*, No. 96-2644, 1996 WL 650902 (E.D. La. 1996) (rejecting argument); *Murray* v. *Board of Education of the City of New York*, 984 F. Supp. 169, 183–84 (S.D.N.Y. 1997) (allowing an at-will employee to pursue her § 1981 claims against defendant officials in their individual capacities); *Baker* v. *American Juice, Inc.*, 870 F. Supp. 878, 883 (N.D. Ind. (continued...)

The Eleventh Circuit's ruling is much broader than merely denying protection to at-will employees. The court held that Petitioner did not suffer actual injury because, as an at-will employee, "he had no constitutionally protected interest in continued employment." *Morast*, 807 F.2d at 930. Thus, the ruling denies protection to all victims of intimidation and retaliation who cannot allege injuries that rise to the level of a separate and distinct constitutional violation -- an interpretation that severely limits the range of injuries that are compensable under the statute. The court, however, offers no analysis -- textual or otherwise -- to support its sweeping conclusion that a plaintiff under 42 U.S.C. § 1985(2) is *required* to show violation of a constitutionally protected interest. There is nothing in the statutory language to suggest that a plaintiff must establish that the required injury "in his person or property" involves a distinct constitutional right or rises to the level of a separate constitutional violation.

2. In addition to being devoid of textual support, the Eleventh Circuit's requirement of injury to a constitutional interest in addition to the interest in protecting federal judicial process is inconsistent with this Court's analysis and conclusion in *Kush*. As explained above, the Court in *Kush* expressly rejected the argument that a plaintiff under § 1985(2) is required to demonstrate an equal protection violation. The Court's

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[8] (...continued)
1994) ("Although at-will employees do not have all the rights of employees who work under fixed-term employment contracts, '[e]mployment at will is not a state of nature' and at-will employees may bring claims under § 1981.") (citation omitted).

reasoning applies to other constitutional violations as well. The Court explained that there is no basis in the language of the first clause of § 1985(2) or the last clause of § 1985(3) for requiring proof of any other statutory or constitutional violation. Nor, the Court concluded, is there any basis for thinking Congress intended to require such proof because its power to protect the integrity of federal judicial proceedings by providing a remedy for witness intimidation is beyond question. Accordingly, *Kush* precludes the Eleventh Circuit's ruling that a plaintiff under 42 U.S.C. § 1985 must prove the existence of an independent constitutional violation.

3. In their opposition to the Petition for Certiorari, some of the Respondents suggested that the Eleventh Circuit's ruling is supported by the procedural due process principles this Court established in cases such as *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972). Brief in Opposition of Respondents Jeanette G. Garrison, HLM, Inc. (f/k/a Healthmaster, Inc.) and Christopher Garrison 15-18. This argument has no merit. In *Roth* and its progeny, the Court addressed the types of liberty and property interests that are afforded the protection of the procedural due process requirements of the Fourteenth Amendment. In *Roth*, for example, the Court held that a state college professor who had neither tenure nor a formal contract (*i.e.*, who essentially was employed at-will) did not have a property interest that entitled him to procedural due process protections under the Fourteenth Amendment, such as the right to a hearing prior to the nonrenewal of his contract. 408 U.S. at 576-78. The Court's conclusion that at-will employees are not entitled to pre-termination hearings is hardly surprising. Such hearings would serve little purpose because the nature of at-will employment

contracts is that employers can fire at-will employees at any time and for any non-prohibited reason.

The procedural due process analysis, however, has no bearing on the substantive question whether an employee is entitled to bring a cause of action for employment retaliation that violates 42 U.S.C. § 1985(2). This Court explicitly has held that a plaintiff's at-will employment status does not defeat his claim that he was fired in retaliation for exercising rights protected under federal law. See, *e.g.*, *Mount Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 283 (1977) (untenured teacher could bring claim that employer discharged him in retaliation for exercising rights protected under the First Amendment, "[e]ven though he could have been discharged for no reason whatever and had no constitutional right to a hearing prior to the decision not to rehire him"); *Perry* v. *Sindermann*, 408 U.S. 593, 596-98 (1972) (same). Therefore, the fact that Petitioner had no due process right to a hearing prior to his discharge (both because he was an at-will employee and because his employer was not a state actor), does not defeat his entitlement to bring a claim under 42 U.S.C. § 1985(2).

The holdings in *Mount Healthy* and *Perry* simply recognize that a plaintiff's at-will employment status under state law does not provide an affirmative defense against a claim of unlawful retaliation under a clear and unqualified federal right. That is, where an employee is discharged in violation of his federal rights, he has a federal cause of action, notwithstanding principles of state law. See *Oubre* v. *Entergy Operations, Inc.*, 118 S. Ct. 838 (1998) (ratification and equitable estoppel defenses are unavailing against ADEA claims, where release of claims did not comply with the clear and unqualified requirements for waivers under the Older Workers Benefit

Protection Act); *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352 (1995) (after-acquired evidence of employee wrongdoing is not a defense to a claim of improper discharge in violation of the ADEA). Thus, Georgia's at-will employment doctrine -- whatever its nature and contours -- is irrelevant to Petitioner's claim under 42 U.S.C. § 1985(2). The first clause of § 1985(2) and the last clause of § 1985(3) categorically provide that any person fired because of truthful testimony in a federal judicial proceeding is entitled to damages under federal law for any injury caused by such conduct, notwithstanding anything in Georgia law.

II. THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS INTENDED TO PROVIDE A CAUSE OF ACTION FOR A PERSON INJURED IN ANY WAY BY ANY ACT IN FURTHERANCE OF A CONSPIRACY TO INTERFERE WITH FEDERAL JUDICIAL PROCEEDINGS BY THREAT, INTIMIDATION, OR RETALIATION.

Because the plain language of 42 U.S.C. § 1985(2) is clear and unambiguous, the Court need not consider anything else in order to determine Congress' intent. *TVA* v. *Hill*, 437 U.S. 153, 184 n.29 (1978). Nevertheless, the legislative history of the Ku Klux Klan Act of 1871, from which 42 U.S.C. § 1985(2) is derived, as well as the language of other Reconstruction-era civil rights statutes, confirms that Congress intended to provide a broad remedy for anyone injured by an act in furtherance of a conspiracy to obstruct federal judicial proceedings.

A. The Ku Klux Klan Act of 1871.

The Ku Klux Klan Act of 1871 was one in a series of Reconstruction-era civil rights statutes designed to prevent civil rights violations and to provide the federal government with authority to address such violations. The Act specifically was designed to address the rising tide of violence and anarchy in the Southern states caused by the activities of the then recently formed Ku Klux Klan. 1 Bernard Schwartz, ed., *Statutory History of the United States, Civil Rights* 591 (1970) ("Schwartz"). Even though Congress had enacted previous civil rights legislation in the Civil Right Act of 1866 and the Enforcement Act of 1870, President Grant sent a message to Congress in 1871 urging it to enact additional legislation because the governments of the Southern states had proven unable to maintain basic social order in the face of the Klan's organized campaign to frustrate the exercise and enjoyment of these new federal rights.

The legislative history of the Ku Klux Klan Act reveals that a principal focus of the legislation was to empower the federal courts to protect civil rights because the state courts were unable or unwilling to do so. During the debates on the legislation, Representative Stoughton declared that "the State courts are notoriously powerless to protect life, person, and property" in the Southern states, where "thousands of murders and outrages have been committed . . . and not a single offender brought to justice." Cong. Globe, 42d Cong., 1st Sess., 322 (1871). See also *id.* at 321 ("The State authorities and local courts are unable or unwilling to check the evil or punish the criminals"); *id.* at 459 (statement of Rep. Coburn) ("The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes

free, the persecuted citizen looks in vain for redress"); *id.* at 449 (statement of Rep. Butler) ("[T]he ordinary machinery of judicial tribunals is entirely inadequate to meet the great emergency which has arisen and erected itself into incipient war").

Moreover, Congress took express notice of the fact that a notorious and insidious Klan tactic was to infiltrate and subvert the integrity of state judicial proceedings. *Id.* at 321-22 (statement of Rep. Stoughton) ("[T]he Ku Klux System is ingeniously devised for the express purpose of enabling a few bad men to intimidate the masses of the people . . . and to control the State courts and local authorities by perjury and fraud"); *id.* at 320 (the Ku Klux organization protects its members "against conviction and punishment, first by disguises and secrecy, and second, by perjury, if necessary, upon the witness-stand and in the jury-box").

Given the grave concerns that motivated Congress to provide remedies in the federal courts as a critical means of enforcing civil rights and restoring social order, and the notorious Klan tactic of corrupting the courts, the only reasonable conclusion is that Congress intended to protect the integrity of the federal courts to the greatest extent possible, from all manner and all forms of interference by intimidation and retaliation. Congress plainly recognized the need to take precautions to protect the federal courts from subversion by the Klan. See, e.g., *id.* at 322 (statement of Rep. Stoughton) ("Congress has power . . . to fully investigate [Klan] outrages, and to provide for their trial and punishment in the United States courts *where perjury in the jury box and on the witness-stand can be guarded against.*") (emphasis added). In this context, it is hardly conceivable that Congress intended to limit the types of injuries that might be

actionable as a result of intimidation and retaliation that the 1871 Act covered, much less that it contemplated a broad exclusion for at-will employees.

This conclusion is further supported by the language that Congress chose. Although the legislative history does not contain any definition of the "injured in his person or property" language that came to be part of 42 U.S.C. § 1985(2), members of Congress used similar language throughout the Congressional debates in contexts indicating that the terms "person" and "property" were meant to be broadly descriptive of comprehensive categories of significant rights. For example, one member of Congress stated that "[t]he only use of governments, the only purpose for which they are instituted, is to protect persons in their *rights of person and property*." Cong. Globe, 42d Cong., 1st Sess., 579 (1871) (statement of Sen. Trumbull). See also *id.* at 320 (statement of Rep. Stoughton) ("There exists at this time in the southern States a treasonable conspiracy against the lives, *persons, and property* of Union citizens); *id.* at 322 ("It is a fundamental principle of law that while the citizen owes allegiance to the Government he has a right to expect and demand protection for life, *person, and property*."); *id.* at 448 (statement of Rep. Butler) ("Can it be, then, that an American citizen is protected in his *rights of person and property* by the Constitution and laws of the United States, with the whole power of the Government, everywhere, except on our own soil, under his own roof-tree, and covered by our own flag?"); *id.* at 459 (statement of Rep. Coburn) ("It is a vain thing to assert the right of suffrage, of representation, and of equality of protection *as to person and property* if none is given to them"). All of these broad uses of the terms "person" and "property" suggest that the "injured in his person or property" language in the statute was not meant to be

language of limitation, but rather was meant to be broadly descriptive of any injury that might be compensated by money damages.

B. The Enforcement Act of 1870.

Other Reconstruction-era civil rights statutes provide further evidence that Congress intended in the Ku Klux Klan Act broadly to proscribe any and all manner of witness intimidation and retaliation relating to federal judicial proceedings, including retaliatory discharge in employment. Section 5 of the Enforcement Act of 1870, ch. 114, 16 Stat. 140, 140-41 (reprinted in Schwartz, at 445-53) (emphasis added), which prohibits voter intimidation, provides:

> That if any person shall prevent, hinder, control, or intimidate, or shall attempt to prevent, hinder, control, or intimidate, any person from exercising or in exercising the right of suffrage . . . by means of bribery, threats, *or threats of depriving such person of employment or occupation*, or of ejecting such person from rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family . . . shall be deemed guilty of a misdemeanor.

Congress' express reference to threats to retaliate against all employees in a statute enacted at the same time as the 1871 Act, and designed to address the same problems and protect the same people, suggests that Congress was specifically aware of and intended to proscribe employment retaliation as a means of subverting civil rights.

The legislative history of the Enforcement Act of 1870 confirms that the Reconstruction-era Congress was cognizant of and intended to prevent threatened and actual discharge of employees as a means of interfering with civil rights. In *United States* v. *Price*, 383 U.S. 787 (1966), which concerned civil rights provisions that derived from the Enforcement Act of 1870, this Court discussed the legislative history and appended to its opinion the remarks of Senator Pool of North Carolina, who sponsored section 5 of the Act. Senator Pool expressly mentioned retaliatory discharge of employees as a means of voter intimidation: "It may often happen, as it has happened up to this time already, that upon the close of an election colored persons will be discharged from employment by their employers." *Price*, 383 U.S. at 816 (Appendix). See also *id.* at 813 ("Suppose he threatens to discharge them from employment [for voting in a particular way] . . . It seems to me it is necessary that we should legislate against that").[9]

Unlike the 1870 Act, which enumerates the types of intimidation and threats that it prohibits, the 1871 Act categorically proscribes interference with federal judicial

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[9] In discussing the legislative history of the Reconstruction-era civil rights statute at issue in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 427 (1968), this Court expressly noted that "[t]he congressional debates are replete with references to private injustices against Negroes -- references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters . . . " This provides further contemporaneous evidence that Congress was well aware of economic and employment retaliation against blacks.

proceedings "by force, intimidation, or threat." Because the language regarding threats in the 1871 Act is far broader than that in the 1870 Act, the former should be interpreted to encompass the threats enumerated in the latter, including "threats of depriving [a] person of employment," regardless of its at-will status. To the extent that the 1871 Act prohibits threats to deprive individuals of employment, it would be unreasonable to conclude that fulfillment of the threat -- in this case, employment retaliation -- does not constitute injury under the statute. At the very least, it would require particularly compelling evidence to support the conclusion that at the same time Congress expressly prohibited firing an at-will employee because of his vote, Congress intended to prohibit *all* retaliation against such an employee because of his participation as a party or witness in a federal judicial proceeding, *except* termination of his employment. As far as we have been able to determine, there is no evidence -- much less compelling evidence -- of any such intent. Thus, consistent with the broad scope that this Court has accorded to the Reconstruction-era civil rights statutes, the Ku Klux Klan Act should be interpreted to prohibit retaliatory termination of at-will employment.

III. NO PURPOSE OF THE STATUTE WOULD BE SERVED BY DENYING PROTECTION TO AT-WILL EMPLOYEES.

The foregoing analysis demonstrates that the principal purposes of 42 U.S.C. § 1985(2) are to preserve the integrity of federal judicial proceedings and to safeguard the right of access to the federal courts by prohibiting all manner of conspiracies to interfere with parties, witnesses, and jurors. No purpose consistent with the statute would be served, and the purposes suggested by its language would be significantly undermined,

if at-will employees were denied protection when employers retaliate against them for participating in federal proceedings. Thus, the court of appeals' interpretation of the statute is squarely inconsistent with Congress' intent because it creates a huge loophole that eviscerates the policies underlying the statute.

The exclusion of at-will employees from the coverage of 42 U.S.C. § 1985(2) would be a broad exclusion indeed. "In most states, virtually all non-union, private sector employees have been employees at will, subject to discharge at the whim of the employer." 1 Lex K. Larson, *Unjust Dismissal* § 1.01, at 1-2 to 1-3 (1998) ("*Larson*"). See also 137 Cong. Rec. E24,382 (Sept. 26, 1991) (statement of Rep. Clay) (more than 60 million private sector workers are employed at-will). Only a small proportion of private-sector employees are unionized. Only 2.2% of agricultural wage and salary workers are represented by unions and only 11.2% of private nonagricultural wage and salary workers are represented by unions. Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts*, ch. 18, Attach. 4, at 18:8701 (1997). Accordingly, more than 97% of agricultural wage and salary workers and more than 88% of private nonagricultural wage and salary workers are presumably at-will employees. Moreover, even employees in unionized industries do not usually have the protection of job-security provisions during their probationary periods, when they can be fired without cause. See, *e.g.*, Susan Tannenbaum, *Employee Relations Guide*, in 3 *Larson* § IIIB, at ERG-14 to ERG-15. In addition, many public sector employees are also employees at will. *E.g.*, *Zimmerman* v. *Cherokee County*, 925 F. Supp. 777, 781 (N.D. Ga. 1995) (deputy sheriffs in a Georgia county that does not have a civil service program are at-will employees); *Jackson* v. *Long*, 102 F.3d 722, 728-30 (4th Cir. 1996)

(sheriff's department employees in North Carolina are at-will employees).

At-will employees are not merely a significant portion of the work force. They also are the class of employees most vulnerable to the types of improper retaliation and intimidation proscribed by 42 U.S.C. § 1985(2). Because at-will employees do not have contractual rights, union representation, or procedural due process protections such as pre- and post-termination hearings, they are most in need of protection against employment retaliation as a result of their participation in federal proceedings. Indeed, under the decision below, the federally protected interests of at-will employees such as Petitioner effectively are placed at the mercy of employers -- even (and perhaps particularly) when the employer is facing serious criminal charges and the innocent employee is a material witness. In short, retaliatory discharge of at-will employees is such a classic and injurious form of intimidation that it would seem to lie at the core of the broad category of injuries covered by the statute.

Thus, the Eleventh Circuit's interpretation of the statute should be rejected because it creates a loophole for a huge and significant category of employer intimidation and retaliation that would undermine the integrity of the federal courts. At the same time, the Eleventh Circuit's interpretation would protect non-at-will employees, even though they may be less vulnerable to intimidation or retaliation, and have other contractual or procedural remedies. It is inconceivable that Congress intended this anomalous result.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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